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No. 89-390

In The
Supreme Court of the United States

October Term, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

THE LTV CORPORATION, LTV STEEL COMPANY, INC., OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, SUBCOMMITTEE OF PARENT CREDITORS OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, LTV BANK GROUP, OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS, BANCTEXAS DALLAS, N.A., FIFTH THIRD BANK, HUNTINGTON NATIONAL BANK, CITIBANK, N.A., DAVID H. MILLER, and WILLIAM W. SHAFFER,
Respondents.

BRIEF OF RESPONDENTS DAVID H. MILLER AND WILLIAM W. SHAFFER

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STATEMENT OF THE CASE

Respondents Miller and Shaffer are participants in the Jones and Laughlin Retirement Plan ("J&L Salaried Plan"). The J&L Salaried Plan is a defined benefit plan exclusively for salaried employees. 5 Ex. J.A. 1300-76.[1] Benefits payable by the plan are for service by salaried employees through December 31, 1985. 5 Ex. J.A. 1300-76. On that date the J&L Salaried Plan was frozen and a replacement defined contribution plan was instituted for all future service of active salaried employees. 5 Ex. J.A. 1300-76.

The J&L Salaried Plan differs from the two hourly plans in certain significant respects. First, the J&L Salaried Plan is not a product of collective bargaining with a labor organization. The benefits payable to salaried employees are not accorded protection by § 1113 of the Bankruptcy Code.[2] Secondly the J&L Salaried Plan has, in addition to three debtor entities, contributing sponsors which are not presently in reorganization nor in bankruptcy. 4 Ex. J.A. 705; 5 Ex. J.A. 1310. Funds and assets of these entities are not part of the debtors estate nor encumbered by the constraints of a debtor in possession.

As with the two hourly plans, the J&L Salaried Plan was involuntarily terminated on January 13, 1987. 6 Ex. J.A. 1539-41. Subsequent to the termination of the plans, LTV established follow-on plans for each of the terminated

[1] References to Ex. J.A. are to the eight volumes of Exhibits to the Joint Appendix filed in the Court of Appeals. These volumes are the PBGC's administrative record.

[2] 11 U.S.C. § 1113 codifies P.L. 98-353, Title III, Subtitle J, § 541(a), 98 Stat. 390 which became effective July 10, 1984 and is applicable to all cases filed under Title 11 of the United States Code commenced after that date. § 1113 will be used for ease of reference.

plans. The PBGC on September 22, 1987, notified LTV Corporation and LTV Steel Company ("LTV") that the J&L Salaried Plan was restored effective January 13, 1987. 6 Ex. J.A. 1578.

The J&L Salaried Plan is the least underfunded of the three plans. The J&L Salaried Plan represents only about 16% of the total underfunding for all three restored pension plans. 5 Ex. J.A. 1153. The J&L Salaried Plan had assets of $260 million and monthly benefit payment obligations of $5 million, if full promised pension benefits were paid to eligible participants. The J&L Salaried Plan required the least annual contributions to comply with minimum funding requirements of ERISA. 5 Ex. J.A. 1153. For 1986 the minimum funding contributions required upon restoration are $25 million, with annual funding thereafter remaining at or about that amount, except that the contribution in 1987 would have been $30 to $35 million for the J&L Salaried Plan if waivers were obtained for the 1984 and 1985 plan years. 1B Ex. J.A. 188-89.

Prior to the restoration notice but after termination, the debtor entities experienced a substantial reversal in business trends resulting in financial gains fully capable of funding the J&L Salaried Plan. LTV's 1987-88 Operating Plan estimated LTV Steel's net income in 1987 and 1988 to be $238 million and $260 million respectively. 1A Ex. J.A. 12. Operating income was projected at $268 million for 1987 1A Ex. J.A. 12-13. LTV Steel's actual performance for the period from January through May 1987 resulted in actual operating income of $163.7 million, $44.9 million above that projected in the Operating Plan. 1A Ex. J.A. 12. LTV Steel's net income of $162.1 million

for the same period exceeded projections by $34.3 million. 4 Ex. J.A. 1036.

In addition to the debtor contributing sponsors, nondebtor contributing sponsors also reported positive operating income for January through May 1987. 1B Ex. J.A. 59. This operating income was not used to make contributions to the J&L Salaried Plan even though four contributing sponsors were not in bankruptcy.

After LTV refused to comply with the restoration notice, the PBGC commenced an enforcement action against LTV. The PBGC filed a motion for summary judgment, which was denied by the district court. *In re Chateauguay Corp.*, 87 B.R. 779 (S.D.N.Y. 1988).

The Court of Appeals affirmed the district court's decision to deny summary judgment to the PBGC. As did the district court, the court of appeals did not consider the merits of restoring any individual plan but rather viewed all three plans collectively.

In evaluating the articulated reasons for restoring the J&L Salaried Plan the court of appeals reasoned that Miller and Shaffer should not be heard to complain that the establishment of the follow-on plans was an abuse of the pension insurance system because Miller and Shaffer received higher benefits than PBGC guaranteed levels. *PBGC v. LTV Corporation*, 875 F.2d 1008, 1018 (2d Cir. 1989).

The court of appeals also concluded that although improved financial circumstances is a basis for restoration, the administrative record did not support PBGC's finding that LTV's financial circumstances had justified restoration. The court faulted the PBGC for emphasizing LTV's short term economic condition and failing to assess the

possibility that the plans would have be to reterminated at some point in the future even though LTV may have been able to fund all three plans for a limited period of time. *Id.* at 1018-1020.

SUMMARY OF ARGUMENT

Respondents Miller and Shaffer maintain that the PBGC properly restored the J&L Salaried Plan. To the extent the PBGC's brief pertains to the J&L Salaried Plan, Miller and Shaffer endorse the arguments advanced by the PBGC. Miller and Shaffer write separately to emphasize matters particular to J&L Salaried Plan.

The J&L Plan, of which Miller and Shaffer are participants, was properly restored. Neither court below independently examined whether the financial details in the administrative record substantiated restoration of the J&L Salaried Plan. Had the courts done so, it would have been seen readily that LTV Steel and non-debtor contributing sponsors could meet the minimum funding standards to continue the J&L Salaried Plan in a restored status.

The power of the PBGC to restore a pension plan is not restrained by a requirement to prove that the employer has the long term financial wherewithal to preclude the possibility that retermination will be necessary at some unknown date in the future. Instead, the PBGC may restore a plan whenever the PBGC determines that restoration is appropriate and consistent with its duties under Title IV of ERISA. The court below erred in holding that the PBGC must determine the long term financial prognosis for the employer's financial health before it could restore a pension plan. Congress did not encumber the PBGC with such an extreme evidentiary burden.

Absent Congressional guidelines, attention to other provisions of Title IV is essential to discern the proper result. Title IV places evidentiary burdens associated with voluntary termination of pension plans upon the employer not the PBGC. Once the PBGC determined that the factors counseling termination were no longer operative and that the employer had the financial resources to meet minimum funding requirements, PBGC honored the Congressional intent underlying ERISA as well as the PBGC's duties under Title IV of ERISA in issuing its restoration notice.

ARGUMENT

I. The J&L Salaried Plan is by Statute a Distinct Entity And The Restoration of That Plan Should Have Been Separately Evaluated

The court of appeals, as did the district court, erred by failing to consider whether restoration of each individual plan was proper. Having neglected significant differences between the J&L Salaried Plan and the two hourly plans, the court of appeals failed to properly evaluate whether the PBGC reasonably could conclude that the establishment of the follow-on plan for salaried participants was an abuse of the pension insurance system. Equally true, the court of appeals perpetuated an error in the district court's evaluation of whether the PBGC's financial analysis substantiated restoration of the J&L Salaried Plan, even if all three plans could not have been restored on September 22, 1987.

The J&L Salaried Plan is a separate distinct defined benefit plan. Plan documents of the plan pertain only to the pension program for salaried employees. 5 Ex. J.A. 1300-76. The two hourly plans restored on September 22,

1987 are bargained for agreements which have no relationship to the J&L Salaried Plan. *See e.g.* 29 U.S.C. § 1102(1). The assets of the J&L Salaried Plan are used to fund benefit payments only to participants in that plan. 29 U.S.C. § 1103(c)(1). In addition, by statute a pension plan is a distinct entity. *See* 29 U.S.C. § 1132(d). Although the Notice of Restoration applied to three pension plans, a single announcement of PBGC's decisions should not have evolved into disregard for the required individual consideration of each pension plan.

The financial analysis in the administrative record plainly supports the PBGC's conclusion that the plan sponsors could maintain the J&L Salaried Plan in a restored status. The J&L Salaried Plan requires only $25 million per year to meet minimum funding requirements. LTV Steel alone had operating income well in excess of that amount in the first six months of 1987 alone. 1A Ex. J.A. 12. Non-debtor contributing sponsors also had a net operating income during that same period. 1B Ex. J.A. 59.[3]

PBGC estimated that 20% of the $90 million funding for the three follow-on plans was money allocated to pay salaried participants of the J&L Plan. If this $18 million were applied to minimum annual contributions rather than the follow-on plan, the plan sponsors need add only another $7 million to fully meet the minimum funding requirements of the J&L Salaried Plan.

Neither court correctly considered the separate status of the three plans and thus erroneously concluded that the administrative record did support the restoration of the J&L Plan.

[3]The presence of non-debtor contributing sponsors is one significant difference ignored by the courts.

II. The Establishment of the Salaried Follow-On Plan Was An Abuse of the Pension Insurance System

While the legislative history of § 4047, 29 U.S.C. § 1347,[4] indicates that improvement in financial circumstances is one appropriate reason for restoration, H. R. Conf. Rep. No. 1280, 93rd Cong., 2nd Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5157-58, the statutory language of Section 4047 is more expansive. The PBGC is empowered by Congress to restore to pretermination status a terminated single employer pension plan

> "in any such case in which the [PBGC] determines such action to be appropriate and consistent with its duties. . . . " 29 U.S.C. § 1347.

Section 4002, 29 U.S.C. § 1302(a)(1)-(3) articulates the duties of the PBGC under Title IV of ERISA. Section 4002 demands that the PBGC

> (1) . . . encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants,
>
> (2) . . . provide for the timely and uninterrupted payment of pension benefits to participants . . . . and
>
> (3) . . . maintain premiums established by the corporation under § 4006 at the lowest level consistent with carrying out its obligations under this Title.

29 U.S.C. § 1302(a)(1)-(3).

[4]ERISA was amended by the Siegler-Employer Pension Plan Amendments Act of 1986, Pub. L. No. 99-272, title XI, 100 Stat. 237 (1986) and again in 1987 by the Pension Protection Act, Pub. L. No. 100-203, title IX, subtitle D, part II, 101 Stat. 1330-333 (1987). References herein to ERISA are to the statute as amended in 1986, as found in 29 U.S.C. (1982 and Supp. IV 1986).

On September 22, 1987, the PBGC issued to LTV a Notice of Restoration informing that three pension plans, including the J&L Salaried Plan, were "restored, effective immediately, to their pretermination status as of January 12, 1987."[5] 6 Ex. J.A. 1578. The restoration decision was premised on three factors articulated in the Notice: "LTV Steel's establishment, after the termination of the Plans, of a retirement program that results in an abuse of the pension plan termination insurance system established by Title IV of ERISA; LTV Steel's improved financial circumstances; and LTV Steel's demonstrated willingness to fund employee retirement arrangements." 6 Ex. J.A. 1578. The PBGC's restoration of the J&L Salaried Plan was wholly consistent with not only the letter but the spirit of the PBGC's legislatively mandated duties articulated in Section 4002 of Title IV of ERISA, 29 U.S.C. § 1302.

Upon termination of the J&L Salaried Plan in January 1987, the PBGC assumed LTV's obligations to fund the guaranteed portion of benefits payable under the plan. Relieved of this cost of doing business, LTV established the follow-on plan which in large measure provides benefits promised under the terminated plan but not guaranteed or paid by the pension insurance system administered by PBGC.

The purposes of Title IV are undermined if LTV is free to shift its pension obligations to the PBGC and then rely on PBGC guaranteed benefit payments to comprise a sizeable portion of a replacement pension program. To permit LTV to restructure pension obligations with the insurance pool as the bedrock of the program escalates premium costs and destroys the incentive for other

[5] A fourth pension plan, Pension Plan of Republic Steel Corporation, was not restored. 3 Ex. J.A. 644.

employers to continue voluntary private pension plans guaranteed by ERISA. The PBGC's conclusions were not implausible, *see Sierra Club v. United States Army Corps of Engineers*, 772 F.2d 1043, 1051 (2d Cir. 1985), and the court of appeals should not have substituted its judgment for that of the PBGC. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

The court of appeals, however, reasoned that because the establishment of the follow-on plans was a product of bargaining under § 1113 of the Bankruptcy Code and in settlement of a lawsuit commenced by the United Steelworkers of America, follow-on plans could not be considered abusive of the pension insurance system. While this reasoning might be correct as applied to the two hourly pension plans, the reasoning is seriously flawed as applied to the J&L Salaried Plan.

The Court of Appeals held that Miller and Shaffer could not be heard to complain because they derived benefit from the follow-on plan. The reasoning misapprehends the argument advanced by Miller and Shaffer.

Miller and Shaffer argued that the district court's reasoning—that the follow-on plans were not abusive of the pension insurance system because the product of mandatory bargaining and settlement of litigation—was not applicable to the follow-on plan established for salaried employees. The court of appeals attributed to Miller and Shaffer a position with respect to all three follow-on plans when Miller and Shaffer specifically limited their argument to the J&L Salaried Plan. Miller and Shaffer Brief at 7-8. Again before this Court, Miller and Shaffer limit their position to the plan in which they are participants, the J&L Salaried Plan.

A restored J&L Salaried Plan immediately reinstitutes the safeguards of ERISA and entitles Miller and Shaffer to ongoing full promised benefits as well as payment of benefits already unpaid by reason of the plan termination. Plainly, plan participants would much prefer to once again be cloaked with the protections of ERISA rather than rely on the uncertain generosity of a bankrupt employer.

The follow-on plan for salaried participants of the J&L Salaried Plan was voluntarily established by LTV. Although § 1113 of the bankruptcy code required collective bargaining with union representatives over the hourly plans, LTV's action with respect to salaried employees was not mandated. The follow-on plan provisions, 4 Ex. J.A. 1085-89, restored substantial nonguaranteed benefit amounts, relying upon termination insurance to subsidize the base amount salaried participants would receive. Absent any bankruptcy provision requiring negotiation over the lost benefits, the PBGC reasonably could conclude that as to the J&L Salaried Plan, the establishment of a follow-on plan not only was evidence of LTV Steel's willingness to fund employee retirement arrangements, but was an abuse of the pension termination insurance system.

III. The Plan Sponsors Must Bear the Burden of Demonstrating Financial Inability to Maintain a Pension Plan

The court of appeals imposed upon the PBGC the burden to prove that plan sponsors would have the long-term financial ability to meet funding obligations and avoid retermination. Neither § 4047 of ERISA nor the legislative history convey that Congress intended the PBGC to maintain a plan in a terminated status until it could demonstrate a plan sponsor's ability to maintain a

pension plan. Equally true, neither § 4047 nor the legislative history address this issue. However, Title IV, viewed in its entirety, evidences a balancing of burdens which counsels that the plan sponsors, not the PBGC and plan participants, must bear the financial burden during periods of uncertainty.

Section 4047 delegates the authority and the responsibility to the PBGC to determine when it is appropriate to restore a terminated pension plan. Section 4042, 29 U.S.C. § 1342, limits this discretion by mandating that an active plan be involuntarily terminated when the plan cannot meet benefit payments when due. Logic dictates that a terminated plan cannot be restored if it must by virtue of § 4042 immediately be involuntarily terminated. However, for a plan with sufficient assets to meet monthly benefit payments, the PBGC exercises discretion guided by its duties under Title IV.

Plan sponsors unable to continue a pension plan have available recourse under distress termination provisions. Section 4041(c) permits plan sponsors to seek termination of a pension plan when continuing to honor those pension promises creates what Congress determined to be unduly burdensome financial obligations. *See* Section 4041(c), 29 U.S.C. § 1341(c). The burden of establishing that the distress criteria is that of the plan sponsor, not the PBGC or plan participants.

These termination provisions represent a Congressional balancing of interests among the PBGC, plan participants and plan sponsors. This balance was reached because

> "Congress wanted to correct this condition [loss of anticipated benefits] by making sure that if a worker

has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—that he actually receive it." *Nachman Corp. v. PBGC*, 446 U.S. 359, 374 (1980).

Restoration under Section 4047 is informed by this Congressional balancing of interests. The PBGC's exercise of its restoration authority, guided by its Title IV duties, should retain the Congressional balance by continuing to demand that plan sponsors demonstrate that the distress criteria would dictate termination.

The court of appeals' insistence that the PBGC evaluate and determine that retermination will not occur in the future reverses the Congressional scheme set forth in Title IV.[6] Even though the J&L Salaried Plan could have been maintained after restoration for an indefinite period, the court of appeals demanded certainty from the PBGC. By imposing the substantial evidentiary burden on the PBGC, the court of appeals implicitly mandated that retirees bear the financial loss even though termination was not mandatory under Section 4042 or necessary under 4041(c). Relegating the plan participants to a position subservient to the plan sponsors during these periods contravenes the central purpose of ERISA.

[6]The J&L Salaried Plan had $260 million dollars in assets and monthly benefit payment obligations of only $5.0 million. 5 Ex. J.A. 1153. Involuntary termination under § 4042 was not mandatory as the J&L Salaried Plan could easily meet payment obligations for more than four years.

CONCLUSION

The decision of the Court of Appeals should be reversed with direction to enter judgment for the PBGC as to the J&L Salaried Plan.

Respectfully submitted

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